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Nature's Way Products, LLC &
Schwabe North America, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHERRY HUNTER, on behalf of herself,	)Case No.: 3:16-cv-00532-WQH-AGS
all others similarly situated, and the)
general public	)Assigned to: Judge William Q. Hayes
	)Magistrate Judge: Andrew G. Schopler
Plaintiffs,)
	)DEFENDANTS NATURE'S WAY
v.	)PRODUCTS, LLC AND SCHWABE
	)NORTH AMERICA, INC.'S
NATURE'S WAY PRODUCTS, LLC	)OBJECTIONS TO PLAINTIFF
and SCHWABE NORTH AMERICA,	)SHERRY HUNTER'S EVIDENCE
INC.,	)SUBMITTED IN SUPPORT OF
	)MOTION FOR CLASS
Defendants.	)CERTIFICATION

Defendants Nature's Way Products, LLC and Schwabe North America, Inc. object to the following evidence presented by Plaintiff Sherry Hunter ("Plaintiff") in support of Motion for Class Certification:

1. The Declaration of Jack Fitzgerald;
2. The unsworn Supplemental Report of Dr. Michael Greger, M.D., FACLM; and
3. The Declaration of Plaintiff Sherry Hunter.

Defendants reserve the right to object and move to strike the opinions of Dr. Greger, Dr. J. Michael Dennis and Mr. Colin Weir under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and its progeny at a later time.

I. THE DECLARATION OF JACK FITZGERALD LACKS FOUNDATION AND IMPERMISSIBLY ATTEMPTS TO SKIRT THE LOCAL RULES

The 17-page Declaration of Jack Fitzgerald ("Fitzgerald Declaration") is a declaration from Plaintiff's counsel that lacks foundation and is an improper end-run around this Court's page limit requirements.

The Fitzgerald Declaration Lacks Foundation

Evidence submitted in support of a Rule 23 motion is subject to the Federal Rules of Evidence. *See, e.g., Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (scrutinizing an expert report for admissibility under Federal Rule of Evidence 702 on a Rule 23 motion). Federal Rule of Evidence 602 states that all non-expert witness testimony, including statements made in a declaration, are only admissible "if evidence is introduced sufficient to support a finding that the witness had personal knowledge of the matter."

Here, vast portions of the Fitzgerald Declaration deal with issues outside of Plaintiff's counsel's personal knowledge. For example, in paragraph 12, Fitzgerald states

1 that “defendants began selling the Nature’s Way Coconut Oil in California on or about
 2 January 30, 2012.” (Fitzgerald Decl., p. 3, ¶12.) However, Mr. Fitzgerald has no
 3 personal knowledge of when defendants sold Nature’s Way Coconut Oil in California
 4 and does not state any facts to show personal knowledge. *Id.* Instead, Mr. Fitzgerald
 5 cites to an interrogatory response. *Id.* Mr. Fitzgerald improperly sets forth additional
 6 facts, supported by citations to discovery responses without any foundation for personal
 7 knowledge of the fact, in paragraphs 10, 13, 16-17, 19, 24, 26-41, and 59. Mr. Fitzgerald
 8 also claims to outline a timeline of when the Class Label Versions were sold in the
 9 marketplace, complete with assumptions of how long previous versions would be sold in
 10 the marketplace. (Fitzgerald Decl., p. 12, ¶¶39-41; Exh. 21.)

11 Each of these paragraphs is objectionable because counsel fails to show any
 12 personal knowledge of the sales patterns of defendants’ products, the timelines for when
 13 products are released and revised, or defendants’ revisions to labels. *See Clark v. County*
 14 *of Tulare*, 755 F.Supp.2d 1075, 7084 (E.D. Cal. 2010) (attorney declaration may not
 15 convey information that the attorney learned during discovery as purportedly information
 16 from the attorney’s personal knowledge).

17 ***The Fitzgerald Declaration Is An Improper Attempt to Exceed This Court’s Page***
 18 ***Limitations***

19 The 17-page Fitzgerald Declaration is an improper attempt to circumvent this
 20 Court’s page limit requirements on a motion for class certification. A party may not use
 21 a declaration “to make an end-run around the page limitations . . . by including legal
 22 arguments outside of the briefs.” *King County v. Rasmussen*, 299 F.3d 1077, 1082 (9th
 23 Cir. 2002). When a party attempts to do so, the proper remedy is to strike the improper
 24 portions of the declaration or strike the entire declaration. *See id.*

25 Here, the Fitzgerald Declaration improperly attempts to argue the class
 26 certification motion in paragraphs 11, 14, 15, 18, 19, 20, and 23. In each paragraph, the
 27 declaration does not set forth facts with Plaintiff’s counsel’s personal knowledge, but
 28

1 instead sets forth his legal arguments about the case.

2 **II. THE SUPPLEMENTAL REPORT OF DR. MICHAEL GREGER, M.D.,**
 3 **FACLM (EXHIBIT 1 OF THE FITZGERALD DECLARATION) IS AN**
 4 **IMPROPER AFFIDAVIT THAT IS INADMISSIBLE HEARSAY**

5 The Court should also disregard the entirety the Supplemental Report of Dr.
 6 Michael Greger attached as Exhibit 1 to the Fitzgerald Declaration. (Dkt. 60-4, p. 1-21.)
 7 The report is improper unsworn testimonial evidence because it is not verified as true
 8 under penalty of perjury as required by both Federal Rule of Evidence 603 and 28 U.S.C.
 9 § 1746.

10 **III. THE DECLARATION OF SHERRY HUNTER IS AN IMPROPER SHAM**
 11 **DECLARATION**

12 It is well settled that a declaration contradicting a declarant's earlier testimony is a
 13 sham declaration. *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012). When a
 14 declaration submitted in support of a pre-trial motion is a sham declaration, the Court
 15 may disregard the declaration. *Id.* at 1080-81.

16 Here, Sherry Hunter's declaration contradicts her previous testimony under oath
 17 and the Court should disregard the new testimony. In Ms. Hunter's previous testimony
 18 under oath, she testified that at the time of her first coconut oil purchase approximately
 19 ten years ago, she believed coconut oil was "healthy" because "[i]t's good for the skin
 20 and I don't recall the rest of the other reasons." (100:10-16.) She understood coconut oil
 21 was "possibly" a "healthy alternative to ... other cooking oils." (100:21-25) She also
 22 added that she believed coconut oil was a "healthier" fat because it came from a "natural
 23 source...I'm not an expert so I just kind of saw that it's a natural – it came from a fruit or
 24 a nut and I thought it was probably healthier." (181:24-182:5)

25 Ms. Hunter now declares that in July 2015 she was convinced to buy Nature's Way
 26 Extra Virgin Coconut Oil because the label "convinced [her] it was a very healthy
 27 product." She then "began consuming it on a regular basis, making special efforts to add
 28 it to my diet . . . because the label made it very clear that even eating it by itself was
 healthy." However, her previous sworn testimony shows that she believed coconut oil

1 was a healthy product eight years prior to seeing the Nature's Way label in 2015. The
 2 Court should disregard Hunter's testimony in support of class certification as a
 3 transparent effort to cast blame on a label she allegedly saw in 2015 for a belief she held
 4 as early as 2007. The Court is not required to give any weight to a self-serving statement
 5 that contradicts a previous statement under oath, and the Court should not give any
 6 weight to Hunter's statements in her declaration in support of class certification.

7 **IV. CONCLUSION**

8 For the foregoing reasons, Defendants respectfully request that the Court strike
 9 paragraphs 10, 12-13, 16-17, 19, 24, 26-41, and 59 of the Fitzgerald Declaration because
 10 they purport to state facts that Plaintiff's counsel has no personal knowledge of. The
 11 Court should also strike paragraphs 11, 14, 15, 18, 19, 20, and 23 because they are
 12 improper attempts to argue the class certification motion and circumvent the page limits
 13 for that motion. The Court should also disregard the entirety of Exhibit 1 to the
 14 Fitzgerald Declaration because it is an expert report that has not been signed under
 15 penalty of perjury and is also inadmissible hearsay. Finally, the Court should strike
 16 paragraphs 2-4 of the Hunter Declaration because it contradicts the plaintiff's prior sworn
 17 testimony.

18 Dated: June 26, 2017

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By: /s/ Thomas R. Watson

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